1879.

11-528 Filed

Jan. 27, 1880

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 177.

PHILADELPHIA BAR ASSOCIATION

THE UNION PASSENGER RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

THE CITY OF PHILADELPHIA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

FILED SEPTEMBER 5, 1877.

SUPREME COURT OF THE UNITED STATES.

No. 177.

THE UNION PASSENGER RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

THE CITY OF PHILADELPHIA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

INDEX.

	Original.	Print.
Petition for writ of error	1	1
Bond	6	2
Writ of error	9	3
Citation	12	4
Docket entries of court of common pleas	13	5
Summons	16	6
Agreed statement of facts	18	6
Assessment of damages	21	8
Writ of error to court of common pleas	22	8
Assignment of errors	24	9
Docket entries of supreme court	25	9
Opinion of supreme court	27	10
Clerk's certificate	32	11
Assignment of errors	33	12

1 To the honorable Daniel Agnew, chief justice of the supreme court of Pennsylvania:

The petition of The Union Passenger Railway Company, of Philadelphia, a body politic incorporated under the laws of the State of Pennsylvania, humbly showeth—

That on the twenty-eighth day of April, A. D. 1875, your petitioners *purchased* a writ of error from the supreme court of Pennsylvania, directed to the judges of the court of common pleas, No. 2, for the county of Philadelphia, commanding said judges to certify to said supreme court the record and proceedings of a certain case then pending in said court of common pleas No. 2, entitled "The City of Philadelphia vs. The Union Passenger Railway Company of Philadelphia." Your petitioners were defendants in said case, and said court of common pleas No. 2, upon a case stated, entered judgment for the plaintiffs, the said City of Philadelphia, and the damages were assessed at $4,218.

The record was thereupon removed by writ of error to the supreme court of Pennsylvania, where your petitioners filed inter alia the following specification of error:

2 "The judgment below impairs the obligation of the contract created by the charter of the Union Passenger Railway Company, and is in conflict with section ten of article one of the Constitution of the United States."

And your petitioners further show that the said supreme court on the twelfth day of February, A. D. 1877, affirmed the judgment of said court of common pleas No. 2, of Philadelphia County, whereby your petitioners will be compelled to pay the sum of four thousand two hundred and eighteen dollars by a judgment which your petitioners aver to be unconstitutional.

And your petitioners further show that said decision of the said supreme court is a decision of the highest court of law of the State of Pennsylvania in which a decision in said suit could be had; that said decision of said supreme court is final; and that the right, title, and immunity claimed by your petitioners was claimed by them under the Constitution of the United States, and that the said decision of the said supreme court is against the right, title, and immunity claimed by your petitioners.

Your petitioners further show that in said suit there was drawn in question the validity of the statute of said State of Pennsylvania, approved April 11th, 1868, entitled "An act to define the duties and

3 liabilities of passenger corporations in the city of Philadelphia," on the ground of its being repugnant to the Constitution of the United States, as specially stated in the specification of error above set forth; and that the decision of the said supreme court of Pennsylvania is in favor of the validity of said statute.

Your petitioners further show that at the time of the commencement of said unconstitutional proceedings, they were and thence have been a body corporate under the laws of said State of Pennsylvania, and as such they were and are entitled to protection from unconstitutional and illegal taxation.

And your petitioners further show that the truth of all of their aforesaid averments as to said proceedings will appear by the record thereof in said supreme court of Pennsylvania for the eastern district to July term, 1876, No. 30, a true copy whereof is exhibited herewith.

Your petitioners therefore pray for the allowance of a writ of error from the Supreme Court of the United States to the supreme court of

the State of Pennsylvania, and to the court of common pleas, No. 2, for the county of Philadelphia, to remove said record into the Supreme Court of the United States, that the said decision of the supreme court
4 of Pennsylvania may be examined and reversed or affirmed in said Supreme Court of the United States, as to right and justice may appertain.

And your petitioners will ever pray, &c.

JACOB E. RIDGEWAY,
Vice-Pres't Union Pass. Railway.

5 Before me, the subscriber, a notary public of the commonwealth of Pennsylvania, personally appeared Jacob E. Ridgeway, who, being duly sworn according to law, did depose and say that he is the vice-president of the said Union Passenger Railway Company of Philadelphia, the above-named petitioners; that the facts set forth in the foregoing petition are true and correct, and that the writ of error is not intended for delay.

JACOB E. RIDGEWAY.

Sworn and subscribed before me this 13th day of February, A. D. 1877.

[SEAL.] FRANCIS E. BREWSTER,
Notary Public.

I certify the above to be a true copy of the original on file with the records of this office.

Feb'y 16, 1877.

SAMUEL BELL,
Clerk Cir. C't U. S., E. D. of Pa.

(Indorsed:) The Union Passenger Railway Company of Philadelphia vs. The City of Philadelphia. Petition of the Union Passenger Railway Company for allowance of writ of error to supreme court of Pennsylvania. Filed Feb. 17, 1877.

FEB'Y 13, 1877.

Writ of error allowed by the chief justice of Penn'a.

DANIEL AGNEW, *C. J.*

Filed Feb. 17, 1877.

6 Know all men by these presents, that The Union Passenger Railway Company of Philadelphia, as principals, and Jacob E. Ridgeway and William Elliott, as sureties, are held and firmly bound unto The City of Philadelphia in the just and full sum of twelve thousand dollars ($12,000), to be paid to the said City of Philadelphia, their successors and assigns, to which payment well and truly to be made the said Union Passenger Railway Company binds itself, its successors and assigns; and the said Jacob E. Ridgeway and William Elliott, sureties, bind themselves, their heirs, executors, administrators, jointly and severally, firmly by these presents.

Whereas lately, in the supreme court of the State of Pennsylvania, in a suit depending in said court between The Union Passenger Railway Company of Philadelphia, as plaintiffs in error, and The City of Philadelphia, defendants in error aforesaid, judgment was rendered against the said plaintiffs in error, and the said plaintiffs in error having obtained a writ of error, and filed a copy thereof in the clerk's office

of said court, to reverse the judgment in the aforesaid suit, and
7 a citation directed to the said defendants in error, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now the condition of the above obligation is such that if the said Union Passenger Railway Company of Philadelphia shall prosecute its said writ of error to effect, and answer all damages and costs, if it fail to make its plea good, then the above obligation to be void, else to remain in full force and virtue.

In witness whereof the said Union Passenger Railway Company has caused its common seal, attested by its secretary, to be hereunto affixed, and the said sureties have hereunto set their hands and seals this 13th day of February, A. D. 1877.

(Signed) JACOB E. RIDGEWAY. [SEAL.]
" WM. ELLIOTT. [SEAL.]

Attest:

{ SEAL OF THE UNION PASS. R'LW'Y CO. OF PHILAD'A. } CHAS. WELSH, *Sec'y.*

8 Signed, sealed, and delivered in the presence of—
JOHN H. ANDERSON,
FRANCIS E. BREWSTER.

Personally appeared before me this 13th day of February, A. D. 1877, the above-named sureties, each of whom, being duly sworn according to law, doth depose and say that they are worth twenty thousand dollars over and above all just debts and liabilities.

JACOB E. RIDGEWAY.
WM. ELLIOTT.

Sworn & subscribed before me this 13th day of February, A. D. 1877.
[SEAL.] FRANCIS E. BREWSTER,
Notary Public.

On behalf of defendants in error, it is agreed that this bond be approved.

(Indorsed:) The Union Passenger Railway Company of Philadelphia vs. The City of Philadelphia. Bond.

PENN'A STATE, *ss:*

Approved this 15th day of Feb'y, 1877.

DANIEL AGNEW.

Filed Feb. 17, 1877.

9 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the supreme court of the State of Pennsylvania, greeting:

Because in the record and proceedings, as also in the rendition of the judgment which is in the said supreme court before you, or some of you, being the highest court of law and equity of said State in which a suit could be had, between The Union Passenger Railway Company of Philadelphia, plaintiffs in error, and The City of Philadelphia, defendants in error, wherein was drawn in question the validity of a statute of

the State of Pennsylvania, and an authority exercised under said statute, on the ground of their being repugnant to the Constitution of the United States, and the decision was in favor of their validity; and wherein was drawn in question the construction of a clause of the Constitution of the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of said Constitution, a manifest error hath happened, to the great damage of the said Union Passenger Railway Company, as is said
10 and appears by its complaint, we, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol in the city of Washington, together with this writ, so that you have the same at the said place before the justices aforesaid on the second Monday of October next, that the record and proceedings aforesaid being inspected the said justices of the Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the honorable Chief Justice of the Supreme Court of the United States, the sixteenth day of February, in the year of our Lord one thousand eight hundred and seventy-seven, and of the Independence of the United States the one hundredth and first.

SAMUEL BELL,
Clerk of the Circuit Court of the United States of America for the Eastern District of Pennsylvania.

11 To the honorable the justices of the Supreme Court of the United States:

The record and the proceedings in the within case, and all things touching the same, are hereby certified by us, and we hereby send as within we are commanded.

March 1, 1877.

DANIEL AGNEW,
Chief Justice.

(Indorsed:) The Union Passenger Railway Company of Philadelphia vs. The City of Philadelphia. Writ of error. Filed Feb. 17, 1877. Francis E. Brewster, David W. Sellers, F. Carroll Brewster.

12 The United States of America unto the City of Philadelphia, greeting:

You are hereby cited and admonished to be and appear at Supreme Court of the United States to be holden at Washington on the second Monday in October next, pursuant to a writ of error filed in the clerk's office of the supreme court of Pennsylvania, wherein you are defendants in error, and the Union Passenger Railway Company of Philadelphia, plaintiffs in error, to show cause, if any there be, why judgment rendered against the said plaintiffs in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the honorable Daniel Agnew, chief justice of the supreme court of the State of Pennsylvania, on this fifteenth day of February, A. D. 1877.

DANIEL AGNEW,
Chief Justice.

On behalf of the defendants in error, I acknowledge that I received a copy of the above citation on February 17, 1877, without prejudice to right to move to quash.

CHARLES H. T. COLLIS,
City Sol'r.

(Indorsed:) The Union Passenger Railway Company of Philadelphia vs. The City of Philadelphia. Citation. Filed Feb. 17, 1877. Francis E. Brewster, David W. Sellers, F. Carroll Brewster.

13 *Docket entries in the court of common pleas of Philadelphia County, Penn'a.*

Exemplification of docket entries.

STATE OF PENNSYLVANIA,
Philadelphia County, sct.:

Among the records and proceedings of the court of common pleas, No. 2, for the county of Philadelphia, State of Pennsylvania, the following may be found as matter of file and of record, at No. 34, September term, 1875, to wit:

Docket entries, September term, 1875.

Collis.

THE CITY OF PHILADELPHIA
vs.
THE UNION PASSENGER RAILWAY CO. OF Philadelphia. } 34.

D. W. Sellers, F. Carroll Brewster.

Sum's, debt.
Exit Sept. 9, 1875.
Ret. 3rd Mon. Sept., 1875.
Service accepted.
Feb'y 18, 1876, case stated filed.
M'ch 18, 1876, judg't for pl'ff on case stated, at the rate of $50 per car.
April 19, 1876, damages assessed at $4,218.60.
April 28, 1876, writ of error from S. C. bro't into office.
14 Certified from the record.
[SEAL.]

E. J. LINDSAY,
Pro Prothonotary.

15 *Præcipe for summons.*

THE CITY OF PHILADELPHIA
vs.
THE UNION PASSENGER RAILWAY CO. OF Philadelphia. } C. P. No. . S. T., 1875. No. .

Please issue summons debt ret'ble 3rd Mond. Sept., 1875.

COLLIS,
P' PEIRCE,
For the City.

To the proth'y, C. P.

(Indorsed:) 34. S. T., 1875. The City v. Union Pass. R. Co. C. P. No. 2. Præcipe for summons, debt. Collis, p' Peirce.

16 *Summons.*

COUNTY OF PHILADELPHIA, *ss:*
The commonwealth of Pennsylvania, to the sheriff of Philadelphia County, greeting:

We command you that you summon The Union Passenger Railway Co. of Philad'a, late of your county, so that they be and appear before our judges at Philadelphia, at our court of common pleas, No. 2, for the county of Philadelphia, to be holden at Philadelphia, in and for the said city and county of Philadelphia, the 3rd Monday of Sept'r next, there to answer the city of Philadelphia of a plea of trespass, debt. And have you then there this writ.

Witness the honorable J. I. Clark Hare, president of our said court at Philadelphia, the 9 day of Sept., in the year of our Lord one thousand eight hundred and seventy-five.

J. C. ADDIS, JR.,
Pro Prothonotary.

17 (Indorsed:) 34. Sep. term, 1875. C. P. No. 2. The City of Philad'a v. The Union Passenger Railway Co. of Philad'a. Summons, debt. Collis.

I accept service of this writ.

DAVID W. SELLERS.

SEPT. 10, '75.

18 *Case stated.*

In the court of common pleas No. II, Sept., 1875.

THE CITY OF PHILADELPHIA
vs.
THE UNION PASSENGER RAILWAY COMPANY. } 34.

It is agreed that the following case be stated for the opinion of the court, with the right to either party to sue out a writ of error to the judgment.

That by "an ordinance supplementary to an ordinance entitled 'an ordinance to regulate passenger railways,' approved July 7th, 1857," approved April 1st, 1859 (139), and by the third section thereof it is provided—

"That each and every passenger railway company shall pay into the office of the chief commissioner of highways in the month of January of each year, for the use of the city, the sum of thirty dollars for each car intended to be run upon any road, and for each and every car placed upon any road before the time herein provided for paying the license, a proportionate sum shall be paid until the succeeding January, and that no car shall be placed or run upon any road or street until it shall be regularly licensed and a certificate duly numbered hung in a conspicuous place in said car."

That the defendants were created a body politic by an act passed April 8, 1864 (P. L. 297), with the authority to construct a railway on certain named streets in the city of Philadelphia. Among other things in said act, it is enacted—

SEC. 4. * * * said railway shall conform in gauge to the passenger railways now laid in the city of Philadelphia. * * *

19 SEC. 8. * * * And the said company is hereby authorized and empowered to construct and lay the said railway, without obtaining the consent of the city councils of the city of Philadelphia; but whenever the said railway shall be laid and used, by running passenger cars thereon, the said company shall be subject to the ordinances of the city of Philadelphia regulating the running of passenger railway cars.

SEC. 10. That the said company shall pay annually into the treasury of the city of Philadelphia, for the use of said city, whenever the dividends declared by said company shall exceed six per cent. per annum, on the par value of the capital stock thereof, a tax of six per cent. on such excess over six per cent., * * * and the said company shall also pay such license for each car run by said company as is now paid by other passenger railway companies in the city of Philadelphia.

By "a further supplement to an ordinance to regulate passenger railways, approved July 7, 1857," approved January 2, 1867 [1], it is enacted—

"That each and every passenger railway company shall pay to the chief commissioner of highways the sum of fifty dollars for each car run upon their respective roads." * * *

That by "An act to define the duties and liabilities of passenger railway corporations in the city of Philadelphia," approved April 11, 1868 (P. L., 849), it is enacted—

"That the several passenger railway corporations in the city of Philadelphia shall pay annually to the said city, in the month of January, the sum of fifty dollars, as required by their charters, for each

20 car intended to be run over their roads during the year, and they shall not be obliged to pay any larger sum; and said city shall have no power by ordinance or otherwise to regulate passenger railway companies, unless authorized so to do by the laws of this commonwealth, expressly in terms relating to passenger railway corporations in the city of Philadelphia." * * *

That in each year previous to the year 1875, the defendants paid the said plaintiff the sum of fifty dollars for each of the cars run by them during such year.

The defendants, in the month of January, 1875, did run seventy-nine cars on their road, and admit their liability to pay to the plaintiffs for each car the sum of thirty dollars and no more.

If the court shall be of opinion that the plaintiffs are entitled to recover the sum of fifty dollars for each car, then judgment to be entered for the plaintiffs at that rate; if not, then judgment to be entered for the plaintiffs at the rate of thirty dollars for each car. The damages to be assessed by the prothonotary.

It is agreed that any act of assembly or ordinance of the city of Philadelphia which may be pertinent to the case here stated shall be considered as embraced herein.

DAVID W. SELLERS,
F. CARROLL BREWSTER,
Counsel for the Defendants.
CHARLES H. T. COLLIS,
City Solicitor.

(Indorsed:) 34. Sept. 1875. City v. Railroad. II. Case stated. Filed Feb'y 18, '76.

21 *Assessment of damages under the judgment.*

THE CITY OF PHILADELPHIA
v.
THE UNION PASSENGER RAILWAY COMPANY. } C. P. No. 2. S. T. 1875. No. 34.

The court having entered judgment upon the case stated in favor of the plaintiff, the proth'y will please assess damages as follows, viz:

License fee of $50 per annum for 79 cars during year 1875..	$3,950
Int. from 1 Feb'y, 1875, to 18 M'ch, 1876.....	268 60
	$4,218 60

C. H. T. COLLIS,
Per GEO. PIERCE,
For the City.

To the Proth'y, C. P.

In accordance with above order I assess damages as above.
JAS. W. FLETCHER,
Pro Proth'y.

(Indorsed:) 34. S. 75. C. P. No. 2. Assessment of damages. Filed Ap'l 19, 1876.

22 *Writ of error from the supreme court of Pennsylvania to the common pleas of Philadelphia.*

EASTERN DISTRICT OF PENNSYLVANIA, *set:*

The commonwealth of Pennsylvania to the justices of the court of common pleas for the county of Philadelphia, No. 2, greeting:

Because in the record and process, and in rendering the judgment in a certain plaint, which was in our said court, before the judges of the same court, by our writ, between The Union Passenger Railway Company, plaintiff in error, and The City of Philadelphia, defendant in error, as it is said manifest error hath intervened, to the great damage of the said plaintiff in error, as by complaint of the said plaintiff in error we have received information. We, willing that, if any error be therein, it should be corrected and that speedy justice be done to the parties in this part, do command you, that if judgment, as it is said, be rendered in the said plea, then the record and process and all things touching the same, under your seals, distinctly and openly, you have before the justices of our supreme court of Pennsylvania, at a supreme court to be held at Philadelphia, in and for the eastern district of said commonwealth, on the first Monday of January next, and this writ, that, the record and process aforesaid being inspected, we may further cause to be done what of right and according to our laws and customs ought.

Witness the honorable Daniel Agnew, doctor of laws, chief justice of our said supreme court, at Philadelphia, the twenty-eighth day of April, in the year of our Lord one thousand eight hundred and seventy-six (1876), and of the commonwealth the one hundredth.

J. ROBINSON,
Pro Prothonotary,
B. E. FLETCHER.

23 (Indorsed:) No. 34. Sep., 1875. No. 2. C. P. No. 30. July term, 1876. Supreme Court. The Union Passenger Railway Company, plaintiff in error, vs. The City of Philadelphia, defendant in error. Ap'l 28, '76, bro't into office. Writ of error to the court of common pleas for the county of Philadelphia. Returnable the first Monday of January, 1877. Rule on the defendant in error to appear and plead on the return day of the writ.

I certify that William B. McGrath and Jacob E. Ridgway are bail in error in the above case in the sum of eight thousand four hundred & thirty-seven $\frac{70}{100}$ dollars.

J. ROBINSON,
Pro Proth'y.

F. C. BREWSTER.
SELLERS.

COUNTY OF PHILADELPHIA, *ss:*

To the honorable the justices of the supreme court for the E. D. of Penn'a:

Pleas and all things touching the same we certify and send, together with this writ.

Witness our hands and seals this 11th day of May, A. D. 1876.

J. I. CLARK HARE,
JOSEPH T. PRATT,
Ass't Judge C. P. No 2.

24 *Specifications of error filed in the supreme court of Pennsylvania.*

Supreme court of Penn'a. July T., 1876.

THE UNION PASSENGER RAILWAY COMPANY, plaintiffs in error, *vs.* THE CITY OF PHILADELPHIA, DEFENDANTS in error. } No. 30.

1. The court below erred in entering judgment at the rate of $50 each car.

2. The judgment below impairs the obligation of the contract created by the charter of the Union Passenger Railway Company, and is in conflict with section ten of article one of the Constitution of the United States.

3. The court below erred in not entering judgment on the case stated at the rate of $30 each car.

25 *Docket entries.*

In the supreme court of Pennsylvania, eastern district, July term, 1876.

D. W. Sellers, F. C. Brewster.

THE UNION PASSENGER RAILWAY COMPANY, plaintiffs in error, *vs.* THE CITY OF PHILADELPHIA, DEFENDANTS in error. } 30.

Writ of error to the court of common pleas of the county of Philadelphia. Ret'ble the first Monday of January, 1877. Exit Ap. 28, 1876.

Dec. 15, 1876.—Assignment of error.

Record returned & filed.

Feb. 12, 1877.—Judgment affirmed.

Feb. 17, 1877.—Certified copy of petition of Union Pass. R. W. Co. for allowance of writ of error to sup. c't of Penn'a filed.

Eo die allowance of writ by Chief Justice Agnew filed. (See endorsement on petition.)

Feb'y 17, 1877.—Bond in $12,000 filed. (See approval of Chief
26 Justice Agnew, endorsed and dated Feb. 15, 1877.)

Feb. 17, 1877.—Copy of bond filed.

Feb. 17, 1877.—Writ of error from Supreme Court of the U. S. to judges of sup. c't of Penn'a brought into office and filed.

Eo die.—Copy of writ of error filed.

Feb. 17, 1877.—Citation filed & record exit.

27 *Opinion of the supreme court of Pennsylvania.*

Error to the court of C. P., No. 2, of Philad'a.

THE UNION PASSENGER R. W. CO.
v.
THE CITY OF PHILAD'A.

Per curiam:

When the case of the Frankford Passenger R. W. Co. in Philad'a (8 P. F. Smith, 119) was before this court, the power of the city to collect a license fee was necessarily found in the exercise of the police power and under the provisions of the act of 15th April, 1850, for "the regulation of omnibuses, or vehicles in the nature thereof," for the reason that then no express power had been conferred by law to impose a tax directly upon the cars of the company. This power, however, has been supplied by the act of 11th April, 1868, S. L., 849, enacting, "That the several passenger railway corporations in the city of Philad'a shall pay annually to the said city, in the month of January, the sum of fifty dollars, as required by their charters, for each car intended to be
28 run over their roads during the year, and they shall not be obliged to pay any larger sum." Stress is laid on the words "as required by their charters," as if the obligation was to be contained therein to pay fifty dollars. That this was not the meaning of the law is obvious, for if it were a charter obligation to pay this sum, the law would be unnecessary. Its reference was clearly to the duty to pay, not to the sum to be paid; & these charters require obedience to the lawful ordinances of the city, under its municipal powers. This is rendered evident by the remainder of the section of the law just quoted, which, as a set-off to, or consideration for, the payment of the fifty dollars tax, took away from the city all power, by ordinance or otherwise, to regulate passenger railways, unless authorized by the express terms of laws referring directly to these corporations. It appears that in each year previous to the year 1875 the defendants paid to the city the sum of fifty dollars for each car run during the year. Now, as this was not done under
29 protest, or in any other way reserving the right of the company to object to the act of 1868, it is a legal conclusion that this company accepted of that act in order to obtain the benefit of the legislation that forbade the city from making regulations affecting it, unless

authorized by a law referring in express terms to these railway corporations. This puts an end to all controversy as to the power of the legislature to pass the act of 1868.

But we are not even disposed to regard that act as unconstitutional. We do not think the terms of the charter, which provided for the payment of such a license fee of thirty dollars as was then paid by the other passenger railway companies in this city, negatives all right of the commonwealth to impose the tax of $50, contained in the act of 1868. The right of the State to impose such a tax rate, or imposition in future, cannot be taken away by a mere implication arising from a direction to pay a certain sum. To fetter her power to levy moneys for public
30 purposes, it needs a plainer negation of her own power. There may be indications of this intention found in other provisions sufficient, with the direction to pay, taken together as a whole, to establish a relinquishment of the power, but it must be plain when it is sought to establish disability to exercise one of the great functions of government. We therefore regard the 10th section of the charter as conferring an authority only upon the city to receive, and imposing an obligation on the company to pay this sum, but not as a contract on part of the commonwealth for the relinquishment of her own power to impose a future burthen.

And if this be not so, still we think the amendment to the constitution of 1857 subordinates charters of incorporation thereafter granted to the power to make alterations therein, provided no injustice be done the corporations. Now, a general law such as the act of 1868, which imposed the duty on all these corporations in this city alike to pay
31 a reasonable sum of money as a tax or rate for the use of the city, whose streets are used by these companies in such a manner as to be often detrimental to their use by the citizens, cannot be said to be injurious to the corporators. In the use of the public streets the balance of convenience over inconvenience is undoubtedly in favor of these railways, else they would not be allowed. Nevertheless there is a counterweight of inconvenience very serious to the citizens in the use of vehicles, the delivery of heavy articles, and portage of goods in narrow streets which must be taken into account, while the profit taken by the stockholders for the use of these railways is often great, and forms a consideration for reasonable burthens.

Upon the whole case we think the judgment of the court below was right, and must be affirmed.

Judg't affirmed.

(Indorsed:) The Union Passenger R. W. Co. v. The City of Philad'a. Per cur. Filed February 12, 1877.

32 STATE OF PENNSYLVANIA:

In the supreme court of said State.

THE UNION PASSENGER R. W. CO.
v.
THE CITY OF PHILADELPHIA.

I, Benjamin E. Fletcher, esq., prothonotary of the supreme court of Pennsylvania for the eastern district of said State, do hereby certify that the foregoing sixteen folios of manuscript and print hereto attached contain a full, true, and complete copy of the whole records and trans-

cript of the entire proceedings had thereon in the supreme court of the State of Pennsylvania, as the same are now of record and on file in my office, including a true copy of the opinion of said court.

In testimony whereof I, Benjamin E. Fletcher, esq., prothonotary of said supreme court of Pennsylvania, hereto set my hand & affix the seal of said court at my office in the city of Philadelphia, in the State of Pennsylvania, this 18th day of July, in the year of our Lord one thousand eight hundred and seventy-seven.

[SEAL.] B. E. FLETCHER,
Prothonotary.

33 In the Supreme Court of the United States.

THE UNION PASSENGER RAILWAY COMPANY, plaintiffs in error,
vs.
THE CITY OF PHILADELPHIA, DEFENDANT IN error.

The plaintiffs in error assign the following specifications of error:

I. The act of the general assembly of Pennsylvania approved April 11th, 1868, entitled "An act to define the duties and liabilities of passenger corporations in the city of Philadelphia" (being the act under which these proceedings were instituted & the final judgment entered), is in conflict with section 10 of Article I of the Constitution of the United States, which provides, inter alia, that "no State shall * * * pass any * * * law impairing the obligation of contracts."

II. The judgment below impairs the obligation of the contract created by the charter of the Union Passenger Railway Company, and is in conflict with said section 10 of Article I of the Constitution of the United States.

34 Wherefore the plaintiffs in error, for the errors above assigned, pray the Supreme Court of the United States to reverse the judgment entered by the said court of common pleas No. 2 for the county of Philadelphia, and the plaintiffs in error pray the said Supreme Court of the United States to reverse the affirmance of the said judgment entered by the supreme court of Pennsylvania.

DAVID W. SELLERS,
F. CARROLL BREWSTER,
Of Counsel for Plaintiffs in Error.

(Indorsement on cover:) No. 177. The Union Passenger Railway Company, pl'ff in error, vs. The City of Philadelphia. Pennsylvania supreme court. Filed 5th September, 1877.

Siddall Brothers, Printers

No. 177

In the Supreme Court of the United States

Writ of Error

TO THE SUPREME COURT OF THE STATE PENNSYLVANIA

THE UNION PASSENGER RAILWAY CO.
plaintiff in error

vs.

THE CITY OF PHILADELPHIA
defendant in error

Brief of Plaintiff in Error

DAVID W. SELLERS
F. CARROLL BREWSTER
Counsel for plaintiff in error

CONTENTS

Statement of the Case - - - pages 2 - 8
Case-Stated - - - - - - 4 - 7
Specifications of Error
in Supreme Court of State 7 - 8
Specifications of Error in this Court - 8 - 9
Argument - - - - - - 10 - 20

No. 177

In the Supreme Court of the United States

Writ of Error

To the Supreme Court of the State Pennsylvania

THE UNION PASSENGER RAILWAY COMPANY

plaintiff in error

vs.

THE CITY OF PHILADELPHIA

defendant in error

STATEMENT OF THE CASE

Before 1857 there were no street passenger railway companies in the City of Philadelphia. In that year, and the year following, several companies were incorporated by the General Assembly of the State of Pennsylvania, in whose charters there were provisions that the consent of the Councils of the City of Philadelphia should be first obtained before the use and occupation of the streets.

Under these provisions, the Councils of the City of Philadelphia passed general Ordinances, which provided, as to the companies under their control, that they should pay a license, for the use of the City, for each car intended to be run, the sum of thirty dollars.

The first jealousy of the people of the City against such railways having been dissipated by the experience in their use, subsequent charters were granted which did not require the consent of the Councils to the occupation of the streets. These companies denied the validity of the license charge, and litigation arose. An Act of the General Assembly of April

15th, 1850 (*Pamphlet Laws of 1850 page 469*), had provided: —

That the Councils of the City of Philadelphia shall have authority by Ordinance to provide for the proper regulation of omnibusses, *or vehicles in the nature thereof*, and to this end it shall be lawful for the said Councils to provide for the issue of a license to such persons as may apply to keep and use omnibusses *or vehicles in the nature thereof.*

The litigation ended by a judgment that a car which was a part of a franchise granted by the State, was a vehicle in the nature of an omnibus, and the license fee was upheld.

Frankford Railway vs. The City of Philadelphia
58 Penna State Reports 119.

With these questions mooted, the plaintiff in error was incorporated in 1864, which, as appears from the Case Stated hereinafter set forth, provided in express words what should be paid the City of Philadelphia as a **tax** and a **license.** Three years after its incorporation, the City increased the license fee to fifty dollars on each car, which was paid by the treasurer of the plaintiff in error, although many of its largest stockholders held the payment to be an unlawful appropriation of the corporate funds, to the extent of the increase. In 1875, the plaintiff in error refused to pay exceeding thirty dollars, and upon suit being brought therefor, the following case was stated for the opinion and judgment of the court: —

CASE STATED

(*pages 6 and 7 of Transcript*)

In the Court of Common Pleas No. 2

September 1875 34

THE CITY OF PHILADELPHIA

vs.

THE UNION PASSENGER RAILWAY CO.

It is agreed that the following case be stated for the opinion of the Court, with the right to either party to sue out a writ of error to the judgment: —

That by "An Ordinance Supplementary to an Ordinance "entitled 'An Ordinance to Regulate Passenger Railways,' "approved July 7th, 1857," approved April 1st, 1859 (*139*) and by the third section thereof, it is provided: — "That "each and every passenger railway company shall pay into "the office of the Chief Commissioner of Highways, in the "month of January of each year, for the use of the City, the "sum of thirty dollars for each car intended to be run upon "any road; and for each and every car placed upon any road

"before the time herein provided for paying the license, a "proportionate sum shall be paid until the succeeding Jan- "uary, and that no car shall be placed or run upon any road "or street until it shall be regularly licensed and a certificate "duly numbered hung in a conspicuous place in said car."

That the defendants were created a body politic by an Act passed April 8th, 1864 [*P. L. 297*], with the authority to construct a railway on certain named streets in the City of Philadelphia. Among other things in said Act it is enacted: —

§4.- * * * * said railway shall conform in guage to the passenger railways now laid in the City of Philadelphia * *.

§8.- * * * * and the said company is hereby authorized and empowered to construct and lay the said railway without obtaining the consent of the City Councils of the City of Philadelphia; but whenever the said railway shall be laid and used by running passenger cars thereon, the said company shall be subject to the Ordinances of the City of Philadelphia regulating the running of passenger railway cars.

§10.- That the said company shall pay annually into the treasury of the City of Philadelphia for the use of said City whenever the dividends declared by said company shall exceed six per cent per annum on the par value of the capital stock thereof, a tax of six per cent on such excess over six per cent * and the said company shall also pay *such license for each car run by said company as is* **now** *paid* by other passenger railway companies in the City of Philadelphia.

By "A Further Supplement to an Ordinance to Regulate "Passenger Railways, approved July 7th, 1857," approved

January 2nd, 1867 (*1*), it is enacted: — "That each and "every passenger railway company shall pay to the Chief "Commissioner of Highways the sum of fifty dollars for each "car run upon their respective roads * * *."

That by "An Act to Define the Duties and Liabilities of "Passenger Railway Corporations in the City of Philadel- "phia," approved April 11th, 1868 [*P. Laws 849*], it is enacted: — "That the several passenger railway corporations "in the City of Philadelphia shall pay annually to the said "City in the month of January the sum of fifty dollars as "required by their charters for each car intended to be run "over their roads during the year, and they shall not be "obliged to pay any larger sum; and said City shall have "no power by Ordinance or otherwise to regulate passenger "railway companies, unless authorized to do so by the laws "of this Commonwealth expressly in terms relating to pas- "senger railway corporations in the City of Philadelphia "* * *."

That in each year previous to the year 1875 the defendants paid the said plaintiff the sum of fifty dollars for each of the cars run by them during the said year.

The defendants, in the month of January, 1875, did run seventy-nine cars on their road, and admit their liability to pay to the plaintiff, for each car, the sum of thirty dollars, and no more.

If the Court shall be of opinion that the plaintiff is entitled to recover the sum of fifty dollars for each car, then judgment to be entered for the plaintiff at that rate; if not, judgment to be entered for the plaintiff at the rate of thirty

dollars for each car. The damages to be assessed by the prothonotary.

It is agreed that any Act of Assembly or Ordinance of the City of Philadelphia which may be pertinent to the case here stated, shall be considered as embraced herein.

DAVID W. SELLERS

F. CARROLL BREWSTER
Counsel for the defendant

CHARLES H. T. COLLIS
City Solicitor

The County Court entered judgment for the City of Philadelphia for fifty dollars a car, delivering no opinion in support thereof. A writ of error was sued out from the Supreme Court of the State upon the following

SPECIFICATIONS OF ERROR

(*page 9 of Transcript*)

1.- The Court below erred in entering judgment at the rate of fifty dollars each car.

2.- The judgment below impairs the obligation of the contract created by the charter of the Union Passenger Railway Company, and is in conflict with Section

ten of Article one of the Constitution of the United States.

3.- The Court below erred in not entering judgment on the Case Stated at the rate of thirty dollars each car.

The Supreme Court affirmed the judgment of the county court, and filed the opinion set forth in the Transcript, pages 10 and 11, to which, in this Court, the following errors have been assigned, *page 12*: —

SPECIFICATIONS OF ERROR

I.- The Act of the General Assembly of Pennsylvania, approved April 11th, 1868, entitled "An Act "to define the Duties and Liabilities of Passenger "Railway Corporations in the City of Philadelphia" [being the Act under which these proceedings were instituted and final judgment rendered], is in conflict with Section 10 of Article 1 of the Constitution of the United States, which provides (inter alia) that no state shall pass any law impairing the obligation of contracts.

II.- The judgment below impairs the obligation

of the contract created by the charter of the Union Passenger Railway Company and is in conflict with the said Section 10 of Article 1 of the Constitution of the United States.

ten of Article one of the Constitution of the United States.

3.- The Court below erred in not entering judgment on the Case Stated at the rate of thirty dollars each car.

The Supreme Court affirmed the judgment of the county court, and filed the opinion set forth in the Transcript, pages 10 and 11, to which, in this Court, the following errors have been assigned, *page 12*: —

SPECIFICATIONS OF ERROR

I.- The Act of the General Assembly of Pennsylvania, approved April 11th, 1868, entitled "An Act "to define the Duties and Liabilities of Passenger "Railway Corporations in the City of Philadelphia" [being the Act under which these proceedings were instituted and final judgment rendered], is in conflict with Section 10 of Article 1 of the Constitution of the United States, which provides (inter alia) that no state shall pass any law impairing the obligation of contracts.

II.- The judgment below impairs the obligation

of the contract created by the charter of the Union Passenger Railway Company and is in conflict with the said Section 10 of Article 1 of the Constitution of the United States.

ARGUMENT

The contract between the State of Pennsylvania and the plaintiff in error arose in law by the acceptance of the charter and the acting thereunder by the corporators. It is therefore to be construed as of that date. Its legal meaning then is the meaning yet. Its change in matter of substance without the assent of the grantee of the franchise is beyond the power of the State; and prohibited burdens imposed are in law always an injustice to the corporation and its stockholders and its corporators.

In this tribunal it may be well to state that the annual charge on each car intended to be run is not technically a **tax.** Taxation in that State is imposed by the City and State under general laws. Neither of these is questioned, nor is exemption claimed from their exercise.

The power of the City to a levy tax is conferred by Act of August 25th, 1864 (*P. L. 1030*), in these words: —

That the City of Philadelphia shall have the power to levy a tax for municipal purposes on all subjects of taxation

specified by the 32nd Section of the Act of April 29th, 1844, and to provide by Ordinance a system for the assessment thereof, and for the collection of taxes thereon.

This is the largest power to tax, ever granted to defendant. Under the Act of February 2nd, 1854 (which extended the City over the County of Philadelphia), it was doubted if the City had the power to levy a tax for municipal purposes on the depots and offices of railway companies. It was contended that these were part and parcel of their capital stock, and as the City could not levy a tax directly on a franchise, or on capital stock, or on declared dividends, it could not *indirectly* do so. This question was put at rest by Act of April 21st, 1858 (*P. L. 385*), which enacted: —

That the offices, depots, car houses and other *real property* of railroad corporations situate in the City (the superstructure of the road and water stations only excepted) are and hereafter shall be subjected to taxation by Ordinance for City purposes.

No power was given to levy a tax on the personalty of the corporation.

Section 32 of Act of April 29th, 1844 (*P. L. 497*), is in these words: —

And whereas it is necessary that provision be made for the payment of the interest upon the State debt: therefore be it further enacted that from and after the passage of this Act all real estate to wit: — houses lands lots of ground and ground rents mills and manufactories of all kinds *

* * also all personal estate to wit: — horses * * * also all mortgages * * all shares of stock * * in any company incorporated * * by this Commonwealth * * all offices * * * * shall be valued and assessed and subject to taxation * * *.

Cars of an incorporated company are not within said Act.

Franchises are not taxed thus. They are not subject to the valuation of the assessor, nor to tax levy of the Township, City or County. The cars of a passenger railway are necessary for the execution of the franchise to convey passengers. Without them the franchise is absolutely worthless. Under this section it has always been held that everything incidental to, or inseperable from, the franchise is exempt from taxation.

In *Navigation Company vs. County, 8 W. & S. 334* (*1845*), the assessor assessed six lock-houses and the tow-path of an incorporated navigation company for taxation for county rates and levies. The county levied a tax on the valuation, of fifteen cents on the one hundred dollars. It was held that these, being necessary for the franchise, were not within the Act.

The doctrine of the above case was carried further in *Navigation Company vs. Commissioners, 11 Penna State Reports 202* (*1849*), in which the toll-

house, tho used as a place of residence, was held not within the Act.

Nor is it further to be contended that the use of the word license is in the sense that the Legislature of the State had not power to authorize the use of streets without an allowance of the Councils. No such limitation of legislative power existed in 1864.

In the *Case of "The Philadelphia and Trenton Rail-"road Company, 6 Wharton 25 (1840)*, the Legislature had granted to that company license to use certain designated streets within the then District of the Northern Liberties (now the 18th and 19th Wards of the City). It was much contested. The exception was urged thereto: — "That it is without the "consent of the District" (*page 34*). At page 43 GIBSON, J., remarks in delivering the opinion of the Court: —

What is the dominion of the public over such a street? In England, a highway is the property of the king, as *parens patriæ*, or universal trustee: in Pennsylvania, it is the property of the people, not of a particular district, but of the whole State, who, constituting as they do the legitimate sovereign, may dispose of it by their representatives, and at their pleasure. Highways, therefore, being universally the property of the State, are subject to its absolute direction and control.

* * * * * * * *

Such being a highway of legislative authority, in what re-

spect is a street in an incorporated town to be distinguished from it? A municipal corporation is a separate community; and hence a notion that it stands in relation to its streets as the State stands in relation to the highways of its territory. That would make it sovereign within its precincts — a thing not to be pretended. The owner of a town plot lays out his streets as he sees fit, or the owner of ground in an unincorporated town dedicates it to public use as a street; but it follows not that the dominion of the State is not immediately attached to it. * * * Were it not for the universality of the public sovereignty, the public lines of communication by railroads and canals might be cut by the authority of every petty borough through which they pass — a doctrine to which Pennsylvania can not submit, and which it would be dangerous to urge. It would be strange, therefore, were the streets of an incorporated town not public highways, subject, perhaps, to corporate regulation for purposes of grading, curbing and paving, but subject also to the paramount authority of the legislature in the regulation of their use by carriages, rail-cars or means of locomotion yet to be invented, and this without distinction between the inhabitants and their fellow-citizens elsewhere. * * * * * * * * I take it, then, that the regulation of a street is given to a corporation for corporate purposes, and subject to the paramount authority of the State in respect to its general and more extended uses * * * * .

In *Stormfeltz vs. Turnpike Company, 13 Penna. State Reports 555 (1850)*, the legislature had authorized a turnpike company to erect a toll gate on one of the streets of the City of Lancaster, as the com-

pany alleged. The City directed its supervisor (the plaintiff) to remove the gate. He did so, and an amicable action was entered to secure a construction of the Act. In delivering the opinion of the Court, COULTER, J., says, page 559: —

The power of the Legislature to establish a turnpike gate in streets or public ways of a city is hardly to be questioned. It is part of the eminent domain which belongs to the sovereign authority. It is conceded to the General Assembly by the grant of all legislative power, and is not restrained by the Bill of Rights. There is nothing in the street, or town, or city, to make it greater, or more distinguished, than a highway in the rural districts, except convenience, and the density of population, and these restrain not the power of legislation The power of making and repairing roads and removing nuisances is granted by law to supervisors of highways under the direction of the court, and they are bound to do it, yet this does not prevent the legislature from authorizing turnpikes, and the erection of gates on these roads. Neither does the obligation of cities to open and repair streets interpose any barrier against the right of the sovereign power to regulate its highways — and streets in a town or city are nothing more.

To the same effect is *Mercer vs. Railroad, 36 Penna. State Reports 99* (*1859*), and there is no contrary doctrine.

It is, therefore, to be remembered that the charge for a license, before 1868, was as a police regulation exercised by the City where no power is conferred

by a charter, under the Act of 1850 hereinbefore cited.

Now under what terms germain to the question before the Court did the plaintiff in error accept the franchise?

I.- Of course subject to the general power of taxation vested in the State:

II.- And to the general power of taxation vested in the City:

Neither of these are disputed.

III - That it should conform in guage to the passenger railways now laid in the City:

This has been done.

IV.- That it shall be subject to the Ordinances of the City regulating the running of passenger railway cars:

The plaintiff in error does so run as to speed and conductors and the like.

V.- Whenever the dividends delared shall exceed six per cent annum on the par value, a tax of six per cent on such excess:

VI.- And also pay such license for each car run as is **now** paid by other passenger railway companies.

Was not this last imposition to continue during the charter? Were they not always to pay what was **then** paid, though all others should thereafter have their charges reduced or remitted? Can it be presumed that this was any other than a limit on the power of the City over it, on the subject of a license charge? If it were not the act of the sovereign legislative power on the subject of a license charge in exclusion of a larger power by the City, what charter use did it serve? If no license charge had been expressed, the power of the City under the Act of 1850 would have operated as of course. It is not to be presumed that two powers on the same subject should exist, nor that a license charge should be made by the City which should be in addition to that fixed by the State. If this were not a limitation, it would have been easy to have omitted the word **now.** Although double impositions, either as taxes or licenses, may be put on the same subject at the time of the charter granted, or arise under general laws, yet they are not to be presumed. In *Railroad Company vs. Sabin, 26 Penna. State Reports 242 (1856)*, a railroad had been incorporated "subject to "a tax of 10,000$ per annum, together with such "further rate of taxation of their stock to an amount "equal to the cost of construction that similar prop-

"erty in the State is or may be subject to." The county, under the general powers, taxed the "ma- "chine shops, foundries, freight and passenger house." This effort was defeated by a charter tax on the stock. The opinion of the Court was delivered by WOODWARD, J., who said, inter alia: —

When, however, instead of surrendering the power (taxation) the Legislature have exercised it by taxing all the property of a particular company in a specified manner, and have intimated no design to subject it to any further taxation we hold the power to be satisfied, and do not add by judicial implications burdens which the Legislature have not thought fit to impose. In short, the taxing power is wholly legislative and not at all judicial, If the Legislature had meant that the property of this company should be taxable in the ordinary mode, under our Acts of Assembly of April 15th, 1834, and the twenty-ninth of April, 1844, *they would have imposed no special taxation;* or, if they *meant that the company should be taxable under these Acts in addition to the special impositions, they would have said so. Without some word to lead us to that conclusion we will not infer that both special and general taxation were intended.*

It is suggested in the opinion of the Court as found on pages 10 and 11 of the Transcript, that the Act of 1868 confers the power. If the plaintiff in error, in 1864, had the contractual relation hereinbefore suggested, of course nothing done in 1868 could impair it. With great respect, however, to that Court, the reasoning is not clearly apprehended. The Court

say that Act refers to the "duty to pay" arising and not to the "sum to be paid." Can this be an accurate and fair interpretation, when the charter in question *names the sum to be paid?*

The fact was and is that very many of the charters contained an express subjection to the Ordinance and its supplements fixing the license charge, and it was meant to limit the imposition on this subject; and in all cases where there was no subjection to such Ordinances, or where, as the case in hand, an amount was fixed, it was further meant to limit the power in the latter part of the Act, in the words: — "And said "City shall have no power by Ordinance or otherwise "to regulate passenger railway companies unless "authorized to do so by the laws of this Common-"wealth, expressly in terms relating to passenger "railway corporations in the City of Philadelphia."

It is difficult to see the legal force of the view suggested by the payments in former years. The Case Stated does not mention under what circumstances they were made, as no recovery was asked as to them — but can it be seriously argued that if a company pay erroneously, that a fresh demand must also be submitted to? Indeed, it is believed the law is otherwise. In *Dodge vs. Woolsey, 18 Howard 331 (1856)*, this Court, at the instance of a stockholder, enjoined the directors of a bank from paying an as-

sessment on stock alleged to be unconstitutional, although the directors had paid former assessments, and were about to pay that in question.

Nor is it easy to apprehend what is meant by the words in the opinion: — "it is a legal conclusion that "this company accepted of that Act in order to ob- "tain the benefit of the legislation." The Case Stated is silent on this subject. The Act was a public one and did not require any acceptance. It can be repealed at any time. It is no part of the charter contract of any passenger railway. *Christ Church vs. The City of Philadelphia, 24 Howard 300 1860*). It was simply an Act to limit the power of the City, so the State should be enabled to acquire larger taxes from the corporations named, for the direct benefit of her treasury.

DAVID W. SELLERS

F. CARROLL BREWSTER

Counsel for plaintiff in error

No. - - - - - - - *177.*

IN THE

SUPREME COURT

Of the United States.

WRIT OF ERROR

To the Supreme Court of the State of Pennsylvania.

Union Passenger Railway Company,
Plaintiff in Error,

VS.

The City of Philadelphia,
Defendant in Error.

BRIEF of ARGUMENT for DEFENDANT in ERROR.

CHARLES E. MORGAN, JR.,
WILLIAM NELSON WEST,
For Defendant in Error.

IN THE

SUPREME COURT

Of the United States.

No. 177.

UNION PASSENGER RAILWAY COMPANY,

Plaintiff in Error,

vs.

THE CITY OF PHILADELPHIA,

Defendant in Error.

Error to the Supreme Court of Pennsylvania.

Philadelphia:
E. C. MARKLEY & SON, PRINTERS, No. 422 LIBRARY STREET.
1880.

ARGUMENT.

The sole question raised by the specifications of error, is:

Did the State of Pennsylvania, by the Act of her Legislature of April 8th, 1864 (P. L. 297), incorporating The Union Passenger Railway Company, relinquish forever all power thereafter to impose upon the said corporation the payment of a license charge of a greater sum than thirty dollars for each car run by it?

For the defendant in error it is submitted:—

First. The language contained in the statute incorporating the Union Passenger Railway Company cannot be construed to be a grant of perpetual immunity from license taxes, or charges, in excess of thirty dollars per car.

Second. The Act of incorporation referred to was subject to alteration under the organic law of the State, viz.: The Constitution of 1838, which reserved to the Commonwealth full power thereafter by a general law to increase the amount of said charge.

I. The charter contains no restriction of the right of the State to increase the license fee. The clause referred to, upon which alone the plaintiff relies as securing to it

perpetual immunity from all license charges in excess of thirty dollars per car, is the latter part of the tenth paragraph of said Act. (See plaintiff's brief, p. 5), and is as follows:

"AND THE SAID COMPANY SHALL ALSO PAY SUCH LICENSE FOR EACH CAR RUN BY SAID COMPANY AS IS NOW PAID BY OTHER PASSENGER RAILWAY COMPANIES IN THE CITY OF PHILADELPHIA."

It is confidently submitted that this clause is not susceptible of the construction contended for. At most it was but a direction that said Company should *then* pay such a license fee as was *then* payable by other corporations of like character. There is no limitation upon the right of the Legislature to increase the amount in the future.

Upon no reasonable ground can it be contended that it vested in the corporation a contractual right to a preference above all other corporations of like character, and an immunity from an increase in the amount of the license.

With respect to claims to exemption from taxation, the right of eminent domain, or the police power, based upon alleged contract rights arising from charters, and where the rights asserted are in derogation of the sovereign power, the burden is on the corporation claiming the exemption to show a clear intent to relinquish on the part of the State. An absolute, express, and unequivocal declaration to that effect is requisite. That a proviso in an act of incorporation similar to that relied upon by the plaintiff in error would not be suffi-

cient to restrict or limit the taxing power of the State, but would be construed to be merely directory, and as but establishing the amount of tax then to be charged, without vesting in the corporation a right to exemption from a future increase thereof, has been repeatedly held by this Court.

See *Philadelphia and Wilmington Railroad Company* vs. *Maryland*. 10 Howard, 393.

Tucker vs. *Ferguson*. 22 Wallace, 527.

West Wisconsin Railway Company vs. *Board of Supervisors*. 5 Otto, 679.

Tomlinson vs. *Jessup*, 15 Wallace 454.

Providence Bank vs. *Billings*. 4 Peters, 514.

This question has been very recently again considered by this Court in *Hoge* vs. *Railroad Company*, 9 Otto, p. 348.

It was there held that the intention of the Legislature to exempt the property of corporations from taxation must be clear beyond a reasonable doubt. It cannot be inferred from uncertain phrases or ambiguous terms. If a doubt arise, it must be solved in favor of the State.

Mr. JUSTICE FIELD, who delivered the opinion of the Court, says (pp. 354 & 355): "The power of the Legislature of a State to exempt particular parcels of property of individuals or of corporations from taxation, not merely during the period of its own existence, but so as to be beyond the control of the taxing power of succeeding Legislatures, has been asserted in several cases by this Court, although against this doctrine there have been earnest protests by individual judges. But though this power is recognized, it

is accompanied with the qualification that the intention of the Legislature to grant the immunity must be clear beyond a reasonable doubt. It cannot be inferred from uncertain phrases or ambiguous terms. The power of taxation is an attribute of sovereignty, and is essential to every independent government. Stripped of this power, it must perish. Whoever, therefore, claims its surrender must show it in language which will admit of no other reasonable construction. If a doubt arise as to the intent of the Legislature, it must be solved in favor of the State."

The reason of the rule adopted in the cases cited *ut supra*, applies with the same force to all assertions of a right to exemption from, or limitation of, either the police power or the right of eminent domain. If any distinction at all is to be drawn, it should be in favor of the police power. No case can be found where a Court has determined that a State may part therewith, and there are cases where it has been expressly decided that it is a power which she cannot barter away or abridge, inasmuch as it is essential to all government. All contracts and all rights are held subject to it. Regulations of this nature affecting them may not only be established and enforced by the State, but may also be changed from time to time. Private corporations, as well as individuals, are subject thereto, and the utmost that the former may demand is that the regulations and impositions shall not conflict with or impair any of the essential rights or privileges granted them.

See *Trustees of Dartmouth College* vs. *Woodward*, 4 Wheat., 518, 629.

Suydan vs. *Moore*, 8 Barbour, 358.

Indianapolis and Cincinnati Railroad Company vs. *Kerchival*, 16 Ind., 84.

Thorpe vs. *Rutland and Burlington Railroad*, 27 Vermont, 140.

State vs. *Noyes*, 47 Me., 189.

Ohio, &c., Railroad vs. *McClelland*, 25 Ill., 140.

The terms of the Act of Assembly, incorporating the plaintiff in error, do not indicate any purpose by the State to grant to it a preference over other corporations of like character, or to limit forever her power to impose a license, to a charge of but thirty dollars per car. If such had been the intention, appropriate language would have been used to express it.

The absence of such language not only establishes the absence of the intention, but shows with certainty that the Legislature did intend that the Union Passenger Railway Company should be subject, not only to the license which was then chargeable upon passenger railway companies, but also to any increase thereof, which, in the future, should be imposed upon such companies.

Such is evidently the meaning of the statute, which provides further, that said companies "shall be subject to the "ordinances of the City regulating the running of passenger "railway cars."

It should be remembered that no complaints have been made, that the amount now charged is unreasonable or excessive. The plaintiffs in error rest their case upon an

asserted immunity, of the nature of a contract right, derived solely from the language of the statute, contained in the tenth paragraph.

II. The charter of the plaintiffs in error was subject to the right of repeal by the Commonwealth.

The constitution of the State of Pennsylvania, in force at the date of the said act of incorporation, in its 26th section provides as follows:

"The Legislature shall have the power to alter, revoke or annul any charter of incorporation hereafter conferred by or under any special or general law, whenever, in their opinion, it may be injurious to the citizens of the Commonwealth; in such manner, however, that no injustice shall be done to the corporators."

See Constitution of the State of Pennsylvania of 1838. Section 26. (Amendment of 1857.)

This provision became a part of every charter granted by the Commonwealth while the Constitution was in force, and was a part of the charter of the plaintiff in error. And however the Court might construe the language of the said charter, with reference to the license charge, independent of said clause of the Constitution, reading it with the right to repeal thus given, the conclusion is unavoidable that the Commonwealth had full and complete power to amend the Act of 1864, so as to increase the amount of the license fee. This power was not limited by the words at the close of said

26th section, as follows: "In such manner, however, that no injustice shall be done to the corporators."

The Supreme Court of Pennsylvania have repeatedly ruled, that said proviso does not include exemptions from taxation; and that a repeal of such exemptions by a general law, imposing burdens, for municipal purposes, upon all corporations of a class, is not an act of "injustice to corporators."

Iron City Bank vs. *The City of Pittsburg*, 1 Wright, 340.

Commonwealth vs. *Fayette County Railroad Company*, 5 P. F. Smith, 454.

Manufacturing Company vs. *The Commonwealth*, 19 P. F. Smith, 137.

Union Improvement Company vs. *The Commonwealth*, 19 P. F. Smith, 140.

See, also, *Miller* vs. *The State*, 15 Wallace, 478; *Holyoake Company* vs. *Lyman*, *Ibid.*, 500.

The Act of 1868 increasing the license tax from thirty dollars to fifty dollars, was a general law, applicable to all the passenger railway companies in the City of Philadelphia.

Under these cases it is clear that it did not work "injustice to the corporators" of the Union Passenger Railway Company.

CHARLES E. MORGAN, JR.,
WM. NELSON WEST,
Of counsel for defendant in error.